Supreme Court, U.S.
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(1)

No. 99-2072

IN THE

Supreme Court of the United States

HEALY TIBBITTS BUILDERS, INC.,

Petitioner,

—v.—

ROBERT CABRAL and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit Court of Appeals has interpreted § 921 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (the Act), as permitting the Benefits Review Board (Board) to conduct appellate review when a record compiled by an administrative law judge does not exist. The Seventh Circuit Court of Appeals has reached the opposite conclusion by noting that Congress strictly limited the Board's scope of authority via § 921(b)(3) which makes the existence of such a record mandatory.

Query: Does the present structure of the Act permit Board review without a record?

LIST OF PARTIES AND DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Petitioner Healy Tibbitts Builders, Inc., is a wholly-owned subsidiary of Weeks Marine, Inc. Both corporations are privately held. There is no public parent corporation or non-wholly-owned subsidiary of Petitioner Healy Tibbitts Builders, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Healy Tibbitts Builders, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals Order denying Petitioner's petition for panel rehearing is reprinted as Appendix A. It has not been officially reported.

The opinion of the court of appeals, reprinted as Appendix B, is officially reported at 201 F.3d 1090 (9th Cir. 2000).

The opinion of the Benefits Review Board, reprinted as Appendix C, has not been officially reported.

The Order of the United States Department of Labor, Office of Administrative Law Judges, reprinted as Appendix D, has not been officially reported.

The Order of the United States Department of Labor, Office of Administrative Law Judges, reprinted as Appendix E, has not been officially reported.

The Compensation Order/Award of Attorney Fees on Reconsideration, reprinted as Appendix F, has not been officially reported.

The Compensation Order/Award of Attorney Fees, reprinted as Appendix G, has not been officially reported.

JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit which was dated and entered on February 2, 2000. On March 28, 2000, a petition for panel rehearing was denied by the Court of Appeals for the Ninth Circuit.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 33 U.S.C. § 921(c).

STATUTES INVOLVED

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 919 and 921 (Appendix H; Appendix I).

STATEMENT OF THE CASE

Claims filed under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (the Act), can, in the event of persistent dispute, travel through a multi-level agency process before reaching a circuit court of appeal that begins with basic claim administration performed at the Office of Workers' Compensation Programs (OWCP), moves to initial adjudication at the Office of Administrative Law Judges (OALJ), and terminates at the Benefits Review Board (Board) with appellate review of OALJ decisions. *See, Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Company*, 514 U.S. 122 (1995). The scope of OWCP authority following the 1972 amendments to the Act has previously been defined by this Court as "limited" to supervising, administering, and rule-making; this Court has clearly noted that adjudicatory responsibility was removed from the OWCP (or Director, OWCP) in

1972. *Id.* Board authority has been strictly defined by the statute which created said Board:

> (3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from *decisions* with respect to claims. . . . The Board's orders shall be based upon the *hearing record*. The findings of fact in the *decision* under review by the Board shall be conclusive if supported by substantial evidence *in the record* considered as a whole.

33 U.S.C. § 921(b)(3) (emphasis added).

This case addresses the narrow question of whether the Act empowers the Board to exercise its statutorily-created review power in the absence of a "decision" and/or a "record".

Respondent Cabral was involved in a work-related accident on September 26, 1994 while in the employ of Petitioner. Said injury resulted in a claim for benefits pursuant to the Act which was initially administered at the OWCP; OWCP proceedings terminated on April 17, 1995 when Respondent Cabral requested initial adjudication at the OALJ.

Following an administrative hearing conducted in accordance with the Act and the Administrative Procedure Act (APA), 5 U.S.C. § 554, a decision was issued awarding limited medical benefits pursuant to 33 U.S.C. § 907. Respondent Cabral's attorney then submitted a fee request for services rendered at the OWCP.

On December 6, 1996, the District Director issued a Compensation Order/Award of Attorney Fees for services rendered at the OWCP. On December 13, 1996, a motion for reconsideration was submitted by Petitioner and on

December 24, 1996, a second Compensation Order/Award of Attorney Fees was issued. On January 2, 1997, Petitioner submitted a request for initial adjudication at the OALJ pursuant to 33 U.S.C. § 919(c) that was subsequently denied by the OALJ because of a perceived lack of authority to "review" discretionary acts of district directors; denied by the Board on the theory that disputes over attorney's fee awards are typically not within the adjudicatory power of the OALJ but rather directly appealable to the Board; and, denied by the Ninth Circuit Court of Appeals who held that "[n]ot all decision-making by the [OWCP] is subject to a hearing before the OALJ. Review of such decisions is, therefore, properly made by the Board."

In so concluding, the Ninth Circuit ignored the fact that Board review in those situations would proceed without a record, *i.e.*, would proceed without what Congress empowered the Board to review. Moreover, the Ninth Circuit declined to follow the Seventh Circuit's holding in *Pearce v. Director, OWCP*, 647 F.2d 716 (7th Cir. 1981), wherein the presence of an OALJ record was deemed a vital condition precedent to the exercise of Board review power.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH PLAIN STATUTORY LANGUAGE.

Any dispute over Board authority must begin with a review of pertinent statutory language which can be found at 33 U.S.C. § 921(b)(3):

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact

> taken by any party in interest from *decisions* with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the *hearing record*. The findings of fact in the *decision* under review by the Board shall be conclusive if supported by substantial evidence in the *record* considered as a whole.

33 U.S.C. § 921(b)(3) (emphasis added).

Said language clearly presupposes the existence of a "substantial question of law or fact", the existence of a "decision", and the existence of a "hearing record" before the Board can exercise its review power. Moreover, that Congress said what it meant and meant what it said when defining the Board's scope of authority is further expressed in the Board's governing regulations which confirm the required existence of a "decision" and a "record" prior to review and which indicates that only evidence which is a part of the "record developed at the hearing before the administrative law judge" can be considered by the Board. 20 C.F.R. § 802.301(a). In short, there is no expression of legislative intent which suggests much less states that Board review can be *de novo* or that Board review can proceed without a "record" or a "decision".

Section 919(d) of the Act requires that hearings held pursuant thereto must be performed in accordance with the APA in front of a hearing examiner (administrative law judge). Most importantly, § 919(d) makes clear that district directors have no authority to conduct hearings or adjudicate. 33 U.S.C. § 919(d); *see also*, *Newport News*, *supra*. This total absence of authority to conduct hearings, when juxtaposed with the imposition of mandatory APA requirements, renders district directors unqualified to create a "hearing record" or issue a "decision". In framing

Board authority in the fashion it did therefore, Congress clearly expressed an intent to permit Board review only from "decisions" issued by administrative law judges that were based on the "hearing record". Were this not the case, Congress certainly would have avoided repeatedly using the critical terms "record", "hearing record", and "decision". There is no ambiguity in the aforecited language; in fact, there is extraordinary clarity as noted by the Seventh Circuit:

> [T]he Board should have refused to hear the appeal and should have remanded it to the Chief Administrative Law Judge for further appropriate action as allowed by 33 U.S.C. Section 921(b)(4) quoted above, because the Board only had authority to review a "hearing record" and there was no such record before it. In short, there was nothing for the Board to review, as it had no authority to consider or review the evidence that had been gathered by the deputy commissioner, or his order, nor to substitute its views for those required to have been, but were not, set forth in an opinion of an administrative law judge.

Pearce, 647 F.2d at 724; *see also Presley v. Tinsley Maintenance Svce.*, 529 F.2d 433, 436 (5th Cir. 1976).

Neither the Ninth Circuit nor the Director has attempted to base their position regarding the propriety of "direct appeals" on the language of the Act or its regulations. While the Ninth Circuit mentions § 921(b)(3) and seems to infer that § 921(b)(4) somehow renders its language ambiguous, their rationale is unexpressed and incomplete. Most importantly, however, the Ninth Circuit and the Director violate the most basic rule of statutory interpretation by engaging in a theoretical discussion of public policy and legislative intent when, in fact, the statute

is clear on its face. "When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished". *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). This Court should reject the Ninth Circuit's tortured analysis of § 921(b)(3) in favor of the clear statutory language.

THE NINTH CIRCUIT'S DECISION IS AT ODDS WITH THE STRUCTURE OF THE ACT.

The Act is a federal workers' compensation statute enacted by Congress in response to this Court's opinion that state compensation laws could not constitutionally reach injuries which occurred upon the navigable waters. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). The Act was largely revised by Congress in 1972 in an attempt to reconcile the competing interests within the maritime industry and to produce a fair compensation scheme for all participants. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977).

As originally enacted, the Act vested both administrative and adjudicatory functions in a single entity—the Director, OWCP. All day-to-day contact with injured workers and their employers/insurance carriers from the standpoint of claims-administration was handled exclusively by the Director and/or his designated deputy commissioners; all *de novo* fact-finding and subsequent adjudication/decision-making was also in the exclusive realm of deputy commissioners.

In 1972, Congress decisively terminated this dual administrator/adjudicator role by removing all adjudicatory power from deputy commissioners because the pre-

1972 dispute resolution process "[failed] to keep separate the functions of administering the program and sitting in judgment on the hearings." S. Rep. No. 92-1125 p. 13, 92d Cong., 2d Sess. (1972). This specific ill is echoed in additional legislative materials:

> H.R. 120006 amends Section 19(d) . . . to make clear that all hearings under the Act are to be conducted in conformity with the Administrative Procedure Act. . . . It is the committee's belief that the administration of the [Act] has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings. Moreover, with the new responsibilities that will evolve upon the Secretary with the passage of this bill it will be extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for the purposes of the disputes brought under this statute.

H.R. Rep. No. 92-11441, 92d Cong., 2d Sess. (1972).

This Court has confirmed the deputy commissioners' total loss of adjudicatory authority in 1972 and the modification of their role to one which is solely administrative, supervisory, and rule-making in nature. *See Newport News, supra.*

To fill this adjudicatory void, Congress inserted 33 U.S.C. § 919(d) and made mandatory the use of administrative law judges for all hearings. Further, Congress required strict application of the APA to all adjudicatory proceedings conducted under the Act; the APA's definition of adjudication clearly dovetails with congressional intent ("agency process for the formulation of an order") as does the split between rule-making and adjudication

seen in the APA. 5 U.S.C. § 551(5) *and* (7). Section 919 reads as follows:

> Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners (administrative law judges).

33 U.S.C. § 919(d)

Finally, completing the total restructure of administration and adjudication under the Act, Congress created the Board—an appellate review body with specific powers and design as set forth above. *See* 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.301(a).

In restructuring the very essence of how the Act was to be implemented on a day-to-day basis, it is quite clear that Congress consciously created a "structure within a structure" by charging the Director with administrative/rulemaking duties, the OALJ with initial adjudication duties, and the Board with appellate review duties. *See Champagne v. Maine Iron Works, Inc.*, 20 BRBS 84, 85 (BRB 1987) (Board held that Director holds administrative role only, all adjudicatory functions reside in OALJ); *Maine v. Brady Hamilton Stevedore Co.*, 18 BRBS 129, 131 (BRB 1986) (same); *Grandy v. Vinnell*, 14 BRBS 504, 507 (BRB 1981) (same).

Notwithstanding this unique legislative clarity, both the Director and the Ninth Circuit reject same in favor of a revised administrative/adjudicatory/appellate structure which can only be interpreted as expanding Board authority beyond § 921(b)(3). To wit: If direct appeals are tenable, the character of Board action changes from appellate review to initial adjudication given the complete absence of either a "record" or a "decision". In short, direct appeals bring the Board beyond its statutory powers by forcing it to create a "record" upon which to base its review or by forcing it to conduct a statutorily-prohibited *de novo* review. This revised structure dilutes congressional intent as manifest through the 1972 amendments, dilutes this Court's findings in *Newport News*, *supra*, and impermissibly legislates from the bench. Finally, the Seventh Circuit has directly rejected the notion that such a revised structure exists and the Sixth Circuit has done similarly on an inferential basis. *See Pyro Mining Co. v. Slaton*, 879 F.2d 187, 190 (6th Cir. 1989) (supporting the right to a hearing at the OALJ because district directors cannot make findings of fact and Board review cannot occur in the absence of OALJ findings of fact).

Direct appeal from district director action to the Board is a fallacy unsupported by statutory language and legislative intent. Moreover, attempts to circumvent the OALJ by labeling certain district director actions as "discretionary" are similarly without merit as once again, such a distinction finds absolutely no support in the Act itself:

> The argument of the respondent that the original application for compensation was adjudicatory in nature and that the application for commutation to a lump sum award was administrative in character and could be disposed of by the deputy commissioner in his discretion without complying with the above cited

> statute and regulations, is unpersuasive. The statute and the regulations make no such distinction. They apply equally to all claims and applications for workmen's compensation benefits which are disputed or controverted. The very fact that the Board considered the appeal in this case refutes and belies respondents' administrative and discretion arguments. In other words, some of the provisions of the statute and regulations were followed by the appeal to the Board, and by its action thereon, but the others with respect to a hearing by an administrative law judge and related proceedings were ignored and violated. If respondents' arguments that the deputy commissioner had the unbridled and absolute discretionary power to finally dispose of the commutation application were followed, his decision should have ended the matter, but of course, it did not.

Pearce, supra, at 726.

Adoption of the Ninth Circuit's holding impermissibly expands the scope of Board authority and destroys the strict constitutional demarcation between adjudication and legislation.

THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF A DIFFERENT CIRCUIT COURT OF APPEAL.

The Ninth Circuit has declared that restricting a party's right to be heard at the OALJ by making direct appeals in certain instances mandatory is a "faithful effectuation" of the text and purpose of the Act as amended in 1972. This declaration places the Ninth Circuit in direct conflict with the Seventh Circuit on a narrow issue of statutory interpretation which carries broad implications regarding the

proper roles played by the OWCP, the OALJ, and the Board within the Act's multi-level agency process. While the Seventh Circuit formulates their conclusion on a plain reading of the Act as revised in 1972, the Ninth Circuit posits a theory which draws an unfounded distinction between "adjudicatory" and "discretionary" acts, which ignores the controlling statutory language, and which expands the scope of authority possessed by the Board beyond that which Congress saw fit. To resolve this conflict, to ensure the proper effectuation of legislative intent, and to establish uniformity and harmony in this area of admiralty jurisdiction (*Crowell v. Benson*, 285 U.S. 22 (1932)), certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 23, 2000
Jersey City, New Jersey

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEALY TIBBITTS BUILDERS, INC.,	:	No. 98-70552
Petitioner,	:	OWCP No. 15-39103
	:	BRB No. 97-1071
v.	:	
	:	ORDER
ROBERT CABRAL and DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,	:	
Respondents.	:	

Before: ALDISERT,[1] O'SCANNLAIN, and HAWKINS, *Circuit Judges.*

The panel has voted to deny the petition for panel rehearing. Judges O'Scannlain and Hawkins have voted to deny the petition for rehearing en banc and Judge Aldisert so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

[1] Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

The petition for rehearing and petition for rehearing en banc are denied.

FILED

MAR 28, 2000

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEALY TIBBITTS BUILDERS, INC., *Petitioner*,	: No. 98-70552 : OWCP No. : 15-39103 : BRB No. 97-1071
v.	:
ROBERT CABRAL and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents.*	: OPINION :

On Petition for Review of an Order
of the Benefits Review Board

Submitted December 7, 1999[1]
San Francisco California

Filed February 2, 2000

Before Ruggero J. Aldisert,[2] Diarmuid F. O'Scannlain, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

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[1] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

[2] Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

OPINION

HAWKINS, *Circuit Judge*:

We must decide whether a party challenging an award of attorney's fees under the Longshore Harbor Workers' Compensation Act, 33 U.S.C. § et seq. (The "Act"), has a right to a hearing before the Office of the Administrative Law Judges ("OALJ") when no factual issues are in dispute. Healy Tibbitts Builders, Inc. ("Tibbitts") petitions for review of the order of the Benefits Review Board ("Board") upholding an Administrative Law Judge's ("ALJ's") dismissal of just such a challenge. Because we conclude that the ALJ properly determined it did not have jurisdiction, we deny the petition.

BACKGROUND

On April 5, 1995, an ALJ awarded Robert Cabral ("Cabral") limited medical benefits under section 907 of the Act for an injury sustained while employed at Tibbitts. Additionally, the ALJ directed Cabral's attorney to file a fee application for his reasonably necessary work performed on behalf of the claim.

Cabral's attorney submitted an application requesting $795 in fees for work performed before the District Director from March 20 through April 18, 1995, the date on which Cabral's claims were transferred to the OALJ. On December 6, 1996, the District Director awarded $322.50 in attorney's fees for the work performed before her office. Tibbitts filed a motion for reconsideration, arguing *inter alia* that Cabral's attorney was not the attorney of record until April 12, 1995; therefore, no fee could be awarded for work done prior to that date. The motion also included a "formal request for a hearing on

the matter [before an ALJ], pursuant to 20 C.F.R. § 702.316" should the District Director deny the request for reconsideration.[3]

Tibbitts's motion was denied and the District Director reduced the award of attorney's fees to $309.50, reflecting a minor mathematical error in the initial judgment. On January 2, 1997, Tibbitts formally made a timely request for a hearing before an ALJ on the issue. The District Director, without passing judgment on the validity of the request, transferred the matter of the OALJ.

The Associate Chief ALJ thereafter *sua sponte* dismissed the proceeding on the ground that the OALJ lacked jurisdiction. The Order of Dismissal stated, in relevant part:

> [T]he Benefits Review Board (Board) has held that assessment of attorney's fees by the District Director is a discretionary act and review of such an award is, therefore, properly sought by filing a notice of appeal with the Board as the administrative law judge has no authority to review the adequacy of a fee award for services performed before the District Director.

Tibbitts appealed the decision to the Board, which upheld the ruling of the ALJ.

STANDARD OF REVIEW

We review the decisions of the Board for errors of law and adherence to the substantial evidence standard. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d

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[3] 20 C.F.R. § 702.316 states in pertinent part: "if any party has requested a hearing, the district director shall prepare the case for transfer to the Office of the Chief Administrative Law Judge."

615, 618 (9th Cir. 1999). While no special deference is owed to the Board's interpretation of the Act, *see e.g., Moyle v. Director, OWCP*, 147 F.3d 1116, 1119 (9th Cir. 1998), "considerable weight" is accorded to the construction of the statute supported by the Director. *Id.*; *Force v. Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991).

ANALYSIS

Tibbitts could have secured a hearing before an ALJ in one of two ways. First, the Act could be construed to confer upon the parties an absolute right to a hearing on all contested issues regardless of whether additional fact-finding is required. The Seventh Circuit has held as much, *see Pearce v. Director, OWCP*, 647 F.2d 716, 726 (7th Cir. 1981), while the Fifth Circuit and the Board have rejected such a broad reading. *See Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 784 (5th Cir. 1988); *Tupper v. Teledyne Movable Offshore*, 13 B.R.B.S. 614, 615 n.1 (1981) (declining to follow *Pearce*); *Cooper v. Todd Pacific Shipyards Corp.*, 22 B.R.B.S. 37, 1989 WL 245289 (DOL Ben. Rev. Bd. Jan. 31, 1989). Alternatively, the matter may involve genuinely disputed issues that require an evidentiary and fact-finding hearing. Tibbitts's arguments on both grounds fail.

I. Absolute Right to a Hearing.

[1] The ability of a party to demand a hearing under the Act is set forth in 33 U.S.C. § 919(c), which reads in pertinent part: "The [District Director] shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon."

We hold that section 919(c) does not necessarily require an evidentiary hearing before an ALJ on all contested issues.

Our decision is consonant with the purposes of the Act. In 1972, Congress amended the Act to separate the administrative and adjudicative functions that had previously been performed by deputy commissioners under the direction of the Director of the Office of Workers' Compensation Programs ("OWCP"). *See* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251. Specifically, the 1972 amendments require that:

> All powers, duties, and responsibilities vested by this chapter on October 27, 1982, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. § 919(d).[4]

[2] Section 919(c), which was not altered by the 1972 amendments, must be read in conjunction with section 919(d). The plain language of section 919(d) indicates that the OALJ's jurisdiction includes only those matters whose determinations were vested in deputy commissioners (now District Directors) "with respect to hearings" prior to 1972. Section 919(d) simply does not pertain to matters for which deputy directors had no authority to hold hearings prior to 1972; therefore, section 919(d) cannot confer an absolute right to a hearing before an ALJ on all contested issues.[5]

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[4] The 1972 amendments also changed the name of "deputy commissioners" to "District Directors."

[5] Whether a "claim" as used in section 919(c) includes a request for or an objection to the award of attorney's fees has not been addressed by any court. While we need not answer this question,

A similar interpretation has been adopted by the Fifth Circuit. In *Ingalls Shipbuilding Division, Litton Systems, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982), *overruled on other grounds sub nom. Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir. 1984) (en banc), the court held that the OALJ did not have the authority to approve compromise settlements made under section 908(i)(a) of the Act. The Fifth Circuit relied in part on the inability of deputy commissioners, prior to the 1972 Amendments, to independently approve such settlements; rather, final approval was vested in the Secretary. Section 919(d) of the Act, the court reasoned, could not have transferred the power to approve such settlements from the deputy commissioners to the OALJ because such authority was never fully vested with the commissioners to begin with. *See Ingalls*, 681 F.2d at 289. We find this reasoning not only persuasive but also consistent with the plain meaning of section 919(d). Accordingly, we hold that the Act does not ipso facto confer an absolute right to a hearing before an ALJ on all contested issues.[6]

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we are skeptical that a "claim" includes issues which are ancillary to the underlying claim for disability or death benefits under the Act. Though neither the Act nor its regulations define "claim," the regulations governing attorney's fees at least implicitly make a distinction between a "claim" and the attorney's fees themselves. *See* 20 C.F.R. § 702.132(a) ("Any person seeking a fee for *services performed* on behalf of a claimant with *respect to claims filed under the Act* shall make application therefore . . .") (emphasis added).

[6] The regulations governing the adjudication procedures of the Act also lend support to our holding that not all disputed issues must be resolved by a hearing before an ALJ. The regulations state: "Where there is a genuine dispute of fact . . . which cannot be disposed of informally, resort must be had to the formal hearing procedures as set forth beginning at § 702.331." 20 C.F.R. § 702.301 (emphasis added).

[3] Inasmuch as section 919(d) does not establish an absolute right to a hearing before an ALJ, we turn to the question of whether the OALJ lacks jurisdiction when the matter involves purely legal issues and there is no factual dispute. Such a construction of the Act appears to be consistent with its plain language, the purpose behind the creation of the OALJ, and finds support in the case law and longstanding Board decisions applying the 1972 Amendments.

[4] As noted, the language of Section 919(d) vests the OALJ with the authority to hear matters that were previously decided by the deputy commissioners only "with respect to hearings." The 1972 Amendments did not establish a new right to a hearing. Rather, they simply require that any hearings that a deputy commissioner would have conducted prior to 1972 must now be conducted by an ALJ under the provisions of the Administrative Procedure Act. If the issue presented to the deputy commissioner did not necessitate an evidentiary hearing prior to 1972, then the same matter lies outside the cognizance of the OALJ under section 919(d). Purely legal disputes or those that did not require fact-finding obviously did not necessitate an evidentiary hearing conducted by the deputy commissioner; accordingly, such disputes are not within the jurisdiction of the OALJ.

This construction of section 919(d) is supported by the purpose behind the 1972 Amendments, which was to "make clear that all hearings under . . . [the] Act are to be conducted in conformity with the Administrative Procedure Act (5 U.S.C. § 554) by hearing examiners [i.e. ALJs] qualified under the Act." H.R. Rep. No. 92-1441, at 1452, reprinted in 1972 U.S.C.C.A.N. 4698, 4708; *see also* S. Rep. 92-1125 (same). The concern animating the creation of the OALJ was the "belief that the adminis-

tration of the . . . Act has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings." *Id.*

As the legislative history makes clear, the Amendments did not confer a new right to a hearing before an ALJ where no hearing would have been necessary before the deputy commissioners. Rather, section 919(d) merely relieved deputy commissioners of the responsibility of holding hearings and transferred those duties to the OALJ along with the requirement that hearings be conducted in accordance with the Administrative Procedure Act. In particular, Congress was concerned that, given the new responsibilities conferred upon the District Directors (the new name for the deputy commissioners) by the 1972 Amendments, it was "extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for the purposes of disputes brought [the Act]." *Id.* The OALJ was created to relieve this concern and ensure more efficient operation of the Act. Nothing more, especially the right to a hearing where none had previously existed, was meant to be read into the Amendments.

[5] This position is also consistent with the long-established views of the Director and with decisions of the Board. Since the 1972 Amendments, which created the Board and the OALJ, both the Director and the Board have consistently taken the position that purely legal issues are not within the jurisdiction of the OALJ. In particular, both bodies have established that disputes as to the adequacy of an award of attorney's fees are within the sole discretion of the District Directors and therefore do not involve any matters that require an evidentiary inquiry.

[6] Such disputes, then, also lie outside of the OALJ's purview. *See, e.g., Ellis v. Blake Constr. Co.*, 8 B.R.B.S. 650, 651 (1978) (when parties have entered into an agreement on a claim, there are not further disputed issues requiring an ALJ hearing and the award of attorney's fees is a discretionary act which is properly reviewed by the Board); *Campbell v. Blake Constr. Co.*, 8 B.R.B.S. 755, 758 (178) (the adjudicatory power of the ALJ under section 919(d) "does not encompass the review of discretionary acts, such as approved or awarded attorneys' fees . . ."); *Lawson v. Atlantic Gulf and Stevedores*, 9 B.R.B.S. 667, 668 (1978) (same); *Mazzella v. United Terminals, Inc.*, 8 B.R.B.S. 755, 758 (1978) (the adjudicatory power of the ALJ under section 919(d) "does not encompass the review of discretionary acts, such as approved or awarded attorneys' fees . . ."); *Lawson v. Atlantic Gulf and Stevedores*, 9 B.R.B.S. 855, 858 (1979) ("Questions of law regarding the application and interpretation of post-award penalty and enforcement provisions of the Act . . . are to be appealed directly to the Benefits Review Board."); *Lonergran v. Ira S. Bushey & Sons, Inc.*, 11 B.R.B.S. 345, 346 (1979) (the proper route for appeal from the deputy commissioner's determination of strictly legal issues is directly to the Board); *Champagne v. Main Iron Works, Inc.*, 20 B.R.B.S. 84, 1987 WL 107383, at * 2 n.1 (DOL Ben.Rev.Bd. March 23, 1987) ("The Board accepts direct appeals from a deputy commissioner only where strictly legal issues or matters within the deputy commissioner's discretion are involved."); *Cooper*, 1989 WL 245289, at *5 n.4 (discretionary acts of a deputy commissioner are only appealable directly to the Board).

The reasoning of the Board and the Director has been approved by at least two courts. *See Oceanic Butler*, 842

F.2d at 784 (holding that the matter in question need not be referred to an ALJ because it involved an "issue of pure law" and there were no "evidentiary questions" in dispute which required a fact-finding hearing); *Lauzon v. Strachan Shipping Co.*, 602 F. Supp. 661, 664 (S.D.Tex. 1985) (where disputed issues were purely legal and no relevant facts needed development by presentation of evidence, resolution by the Deputy Commissioner was not inappropriate despite § 19(d), *aff'd*, 782 F.2d 1217, 1222 (5th Cir. 1985)).

These decisions are grounded in sound policy, especially with respect to a District Director's award of attorney's fees. A dispute as to the adequacy of attorney's fees for work performed before the District Director generally involves either purely legal issues or facts that are uniquely known to the District Director. As the Fifth Circuit noted in *Oceanic Butler*, when purely legal issues are in dispute, referral to an ALJ merely produces "additional delay" and can therefore be "inefficient" and "illogical." *Oceanic Butler*, 842, F.2d at 784. Furthermore, referral of legal disputes to the OALJ does not comport with its central role as a fact-finding body.[7]

As for attorney's fees, the regulations require that the requesting party "shall make application therefor to the

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[7] That the main purpose of the OALJ is to function as a fact-finding tribunal is not in dispute. Genuine factual disputes at the District Director level are referred to the OALJ. *See* 20 C.F.R. § 702.301. Additionally, the Board is prohibited from conducting a de novo review of an ALJ's decision and may only set it aside if the decision is not "supported by substantial evidence in the record considered as a whole or in accordance with law." 20 C.F.R. § 802.301(a). *See also* 33 U.S.C. § 921 ("The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.") Thus, the only body empowered to make findings of disputed fact is the OALJ.

district director, administrative law judge, Board or court, as the case may be, before whom the services were performed." 20 C.F.R. § 702.132(a) (emphasis added). This procedure is markedly different from the one for establishing liability and compensation on the underlying claim (and therefore further supports the view that a request for attorney's fees does not constitute a "claim" under the Act). The process for determining attorney's fees does not start with an informal conference before the District Director. Rather, it begins with the body before which the attorney requesting fees appeared.

Additionally, the regulations specifically provide that attorney's fees shall be awarded based on qualitative, subjective facts that are uniquely within the knowledge of the body before which the attorney appeared. Section 702.132(a) states that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded." *Id.* While review of the District Director's award is certainly necessary, it is best effectuated through appeal to the Board and not the OALJ, whose task is to make findings of fact and not reasonableness determinations based on considerations about which it has no immediate knowledge.[8]

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[8] Indeed, it has consistently been the Director's position since the enactment of the 1972 Amendments that District Directors' determinations that are not reviewable by the OALJ may be reviewed by the Board, generally under a deferential abuse of discretion standard. *See, e.g., Loiselle v. Portland Stevedoring Co.*, 2 B.R.B.S. 214, 218-19 (Aug. 29, 1975) (consideration by the deputy commissioner of application for commutation of future benefits does not require a hearing before the ALJ but is reviewed on the record created by the deputy commissioner); *Pearce v. McDonnel Douglas Corp.*,

We understand our position is at odds with the Seventh Circuit's opinion in *Pearce v. Director, OWCP*, 647 F.2d 716 (7th Cir. 1981). In *Pearce*, the court held that the District Director had the plain duty to transfer a case concerning a request to convert periodic compensation payments into a lump-sum award to the OALJ when the claimant had requested a hearing. *See id.* at 724-725.

In reaching this conclusion, the court cited to section 921(b)(3) of the Act, which states that decisions and orders of the Board "shall be based upon the hearing record." 33 U.S.C. § 921(b)(3). According to the *Pearce* court, "this provision assumes that a hearing was had on the claim by an administrative law judge and that a record was made of the hearing . . . ." *Pearce*, 647 F.2d at 725. Therefore, the Board had "no authority to consider or review the evidence that had been gathered by the deputy commissioner" because the Board could only review a "hearing record" and such a record can only be developed in an ALJ proceeding. *See Id.* The Seventh Circuit concluded that the "statute and regulations make no . . . distinction" between requests for hearings on claims that are "adjudicatory" in nature and those that are "administrative" in nature. *Id.* at 726.

The Seventh Circuit appears to be alone in its view; *Pearce* has not been followed or cited favorably by any other court. The Board itself has declined to follow the case outside of the Seventh Circuit. *See Tupper*, 13 B.R.B.S. at 615 n.1 (declining to follow *Pearce* and reiterating the distinction between "strictly legal issues,"

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5 B.R.B.S. 573, 578 (March 14, 1977) (same); *Marcum v. Director, OWCP*, 12 B.R.B.S. 355, 357 (Board may only set aside a District Director's award of attorney's fees if arbitrary, capricious, or an abuse of discretion); *Story v. Navy Exchange Service Center*, 1999 WL 695530, at *1 (DOL Ben.Rev.Bd., August 6, 1999) (same).

which are appealed directly to the Board, and "disputes involving questions of both law and fact," which are appealable to the OALJ).

The Seventh Circuit's analysis in *Pearce* also appears not to consider section 921(b)(4) in light of the overall statutory structure. *See In re Bonner Mall Partnership*, 2 F.3d 899, 915 (9th Cir. 1993) ("In interpreting statutory language we are not confined to the specific provision at issue but may look to the structure of the law as a whole . . . .") (citation omitted). As was noted, section 919(c) must be read in conjunction with section 919(d), which provides only for the vesting of the District Director's responsibilities which existed prior to 1972 "with respect to hearings."

Not all decision-making by the District Director is subject to a hearing before the ALJ. *See Ingalls Shipbuilding Division*, 681 F.2d at 289. Review of such decisions is, therefore, properly made by the Board. Additionally, as our discussion above indicated, entitling a party to a hearing before an ALJ on all contested issues would waste resources by placing a host of purely legal matters before a tribunal whose purpose is primarily to engage in fact-finding. We are satisfied that the current structure of appeals from a District Director's rulings is a faithful effectuation of the text and purpose of the Act as amended in 1972.

II. Genuinely Disputed Issues Necessitating an Evidentiary Hearing.

[7] An award of attorney's fees may be appealable to the OALJ if the appeal were based on disputed facts that require an evidentiary hearing. The Board held that the instant case did not require an evidentiary hearing before an ALJ. We uphold this decision, as it is supported by

substantial evidence and did not involve an error of law. *See Duhagon*, 169 F.3d at 618 (Board decisions reviewed for errors of law and adherence to substantial evidence standard).

[8] Because an award of attorney's fees is within the District Director's discretion, the only conceivable factual dispute would be over when Cabral's attorney began to perform professional services. The Board has consistently held, however, that the actual date on which an attorney's representation of a claimant is filed with the OWCP has no bearing on whether the requested fee is reasonable in light of the work performed. *See Liggett v. Crescent City Marine Ways & Drydock Co.*, 1997 WL 692212 (DOL Ben.Rev.Bd. Oct. 16, 1997) (en banc); *Grimm v. Director, OWCP*, 4 BLR 1-203 (1981).

[9] The Board accepted the District Director's conclusion that the claimant's attorney adequately explained his representation in this case and that the explanation was incorporated into the District Director's compensation award. In light of Board precedent and the adequate explanation of the work claimant's counsel had performed, we affirm the Board's decision that the award of attorney's fees involved no factual dispute that would require a hearing before an ALJ.

[10] Finally, the Board's finding that Tibbitts did not file an appeal with the Board within the required thirty days after the District Director's ruling became final is supported by the record. *See* 33 U.S.C. § 921(a); 20 CFR § 802.205. Nor does Tibbitts's request for a hearing before an ALJ constitute an appeal to the Board. *See Porter v. Kwajalein Services, Inc.*, 1997 WL 609352, at *2 (DOL Ben.Rev.Bd. Sept. 25, 1997) (holding that a motion to the OALJ requesting that its order be set aside "does not evince an intent to seek Board review

. . . ."), *aff'd on reh'g*, 1998 WL 230203 (DOL Ben.Rev.Bd. Apr. 9, 1998). Tibbitts did file a direct appeal to the Board, but this action was some 120 days after the District Director's order became final. The Board properly dismissed the appeal.

PETITION DENIED.

APPENDIX C

U.S. Department of Labor

Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601

BRB No. 97-1071

ROBERT CABRAL *Claimant-Respondent,* v. HEALY TIBBITTS BUILDERS, INCORPORATED *Self-Insured Employer-Petitioner*	NOT PUBLISHED DATE ISSUED: MAR 24 1998 DECISION AND ORDER

Appeal of the Order of Dismissal and Order Denying Employer's Motion for Reconsideration of James Guill, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney Fees and Compensation Order Award of Attorney Fees on Reconsideration of Joyce L. Terry, District Director, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for Claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey for self-insured employer.

Before: HALL, *Chief Administrative Appeals Judge*, SMITH and DOLDER, *Administrative Appeals Judge*.

PER CURIAM:

Employer appeals the Order of Dismissal and Order Denying Employer's Motion for Reconsideration (95-LHC-1763) of Administrative Law judge James Guill, and the Compensation Order Award of Attorney Fees and Compensation Order Award of Attorney Fees on Reconsideration (Case No. 15-39103) of District Director Joyce L. Terry rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3). The amount of an attorney's fee is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel submitted an attorney's fee application to the district director for work performed before the Office of Workers' Compensation Programs (OWCP) between March 20, 1995, and April 18, 1995, requesting a total fee of $795.[1] In her Compensation Order dated

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[1] Below is a brief synopsis of the procedural history of this case. Claimant, as a result of a back injury sustained while working for employer as a crane operator aboard a crane barge on September 26, 1994, filed claims seeking compensation under both the Jones Act and Longshore Act. With regard to the claim brought under the Jones

December 6, 1996, the district director awarded counsel an attorney's fee of $332.50, representing 4.1 hours of work by counsel at an hourly rate of $150, and 3.8 hours of work by counsel's legal assistant at an hourly rate of $100. In response to employer's motion, the district director issued a Compensation Order on Reconsideration in which she reduced the award by $23 due to a mathematical error.[2]

Employer subsequently filed an LS-18/Pre-Hearing Statement seeking de novo review of the district director's Compensation Orders before the Office of Administrative Law Judges on the grounds that the district director failed to consider its contention that claimant's counsel was not the attorney of record at the OWCP until April 12, 1995, and thus was not entitled to any

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Act, the United States Court of Appeals for the Ninth Circuit determined that claimant was a land-based worker with only a transitory or sporadic connection to the barge, and thus concluded that claimant was not a seaman entitled to compensation under the Jones Act. *Cabral v. Healy Tibbitts Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997), petition for cert. pending, No. 97-1346. Accordingly, the Ninth Circuit affirmed the district court's decision to grant summary judgment in favor of employer. *Id.* With regard to the claim brought under the Longshore Act, Administrative Law Judge Paul A. Mapes, by Decision and Order issued April 5, 1996, determined that claimant is not entitled to disability benefits on the grounds that claimant failed to show that at any relevant time he was unable to perform the duties of a crane operator. Judge Mapes, however, awarded medical benefits and subsequently issued a Supplemental Decision and Order Awarding Attorney's Fees to claimant's counsel for work performed at the Office of Administrative Law Judge level totaling $3,052.50. Judge Mapes' decisions were not appealed to the Board.

[2] We correct the district director's error in recalculating the fee owed to claimant's counsel, and thus modify her Compensation Order Award of Attorney Fees on Reconsideration to reflect that counsel is awarded $309.50 rather than the $309.00 stated by the district director.

attorney's fee for worked performed prior to that date. In his Order of Dismissal, the administrative law judge rejected employer's request for a hearing, concluding that he does not have subject matter jurisdiction over the district director's attorney's fee award.[3] Employer's motion for reconsideration was subsequently denied by the administrative law judge in his Order dated April 2, 1997.

On appeal, employer challenges the administrative law judge's Order of Dismissal and subsequent denial of its motion for reconsideration, and the district director's Compensation Orders awarding an attorney's fee. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erroneously assumed the employer sought to challenge the adequacy of the contested fee award, when, in actuality, its request for a de novo hearing is premised on the district director's failure to address what it considers a legal/factual issue presented below, i.e., whether/how long claimant's counsel was the attorney of record at the OWCP level. Employer asserts that as the district director is relegated to a purely administrative role, she has no authority to make findings of fact and as employer maintains that the dispute involves a question of fact with regard to the fee awarded by the district director, it has an absolute right to a hearing before the administrative law judge. Consequently, employer requests that the administrative law judge's Orders of Dismissal be vacated and the case be remanded for a formal hearing on the relevant issue as to when claimant's counsel became the counsel of record with the OWCP.

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[3] The administrative law judge specifically determined that he does not have the authority to review the adequacy of a fee award for services performed before the district director.

Section 28(c) of the Act, 33 U.S.C. § 928(c), and 20 C.F.R. § 702.132 provide that an attorney seeking a fee shall make application to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed. It is therefore well-settled that each adjudicatory level must set the appropriate award of an attorney's fee for the services performed before it. *See generally Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980); *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979). Moreover, the Board has held that disputes over attorney's fee awards before the district director are typically not within the adjudicatory power of the administrative law judge, and thus are directly appealable to the Board. *See Glenn v. Tampa Ship Repair & Dry Dock*, 18 BRBS 205 (1986).

The Board has enunciated three basic principles regarding whether a district director's action should be reviewed by an administrative law judge or by the Board. *Id.* First, review of discretionary acts of the district director must be undertaken by the Board. *Glenn*, 18 BRBS at 205; *see generally Mazzella v. United Terminals, Inc.*, 8 BRBS 755, *aff'd on recon.*, 9 BRBS 191 (1978). Second, the proper route for appeal of the district director's determination of strictly legal issues is directly to the Board. *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc) (Brown and McGranery, JJ., concurring and dissenting); *Glenn*, 18 BRBS at 205; *Tupper v. Teledyne Movable Offshore*, 13 BRBS 614 (1981); *Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979). Finally, when a fee dispute involves questions of fact the case must be referred to an administrative law judge. *Glenn*, 18 BRBS at 205; *Mazzella*, 8 BRBS at 755.

Employer in the instant case states that the relevant issue centers on the district director's failure to consider its argument relating to the date counsel became the attorney of record. *See* Employer's Brief in support of Petition for Review at 2-7. Employer also notes its argument involves a legal/factual determination for which it is entitled to a formal hearing before an administrative law judge. *Id.* Contrary to employer's contentions, it is not entitled to a formal hearing before an administrative law judge with regard to the district director's alleged error in awarding an attorney's fee for work performed at that level.[4] 33 U.S.C. § 928(c); 20 C.F.R. § 702.132; *Revoir*, 12 BRBS at 524; *Owens*, 11 BRBS at 409; *see also Jarrell v. Newport News & Dry Dock Co.*, 19 BRBS 216 (1987); *Glenn*, 18 BRBS at 205. First, the instant case presents, in part, a question over whether the district director properly determined the number of compensable hours, and thus concerns the adequacy of the fee award, which falls within the district director's discretionary authority. In addition, the relevant issue as outlined by employer, i.e., whether the grounds for employer liability under Section 28 are met, involves a legal interpretation.[5] *Glenn*, 18 BRBS at 205. Conse-

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[4] We further note that employer's reliance upon Sections 702.315 and 702.316, 20 C.F.R. §§ 701.315, 702.316, for the proposition that it has an absolute right to a formal hearing before an administrative law judge upon request, is misplaced since the scope of those provisions concerns the adjudication procedures pertaining to claimant's rights to compensation for disability and/or medical benefits and thus does not concern, as is present in this case, counsel's ability to obtain an attorney's fee award. *See* 20 C.F.R. §§ 702.301.

[5] A determination of the actual date claimant's counsel filed formal notice of representation is necessary only if such a filing is relevant to employer's fee liability as a matter of law. *See* n.6, *infra*.

quently, as there are no questions of fact at issue with regard to the district director's attorney's fee award, those awards should have been directly appealed from the district director to the Board. *Jarrell*, 19 BRBS at 216; *Glenn*, 18 BRBS at 205. The administrative law judge's dismissal of employer's request for a hearing on the district director's award of an attorney's fee for services rendered before her in this case is therefore affirmed.

In addition, the Board lacks jurisdiction to review the merits of the district director's Compensation Orders awarding an attorney's fee as employer did not file an appeal to the Board within thirty days of the date that the district director's order on reconsideration was filed on December 24, 1996. *See* 33 U.S.C. § 921(a); 20 C.F.R. §§ 801.205, 702.350; *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997); *see also Ins. Co. of North America v. Gee*, 702 F.2d 411, 15 BRBS 107 (CRT) (2d Cir. 1983). Although the Board's regulations provide that a notice of appeal filed with another governmental agency or subdivision of the Department of Labor shall be considered filed with the Board as of the date it was received by that entity, where it is in the interest of justice to do so, *see* 20 C.F.R. § 802.207(a)(2), employer's request for a formal hearing before an administrative law judge is not a notice of appeal to the Board. *Porter*, 31 BRBS at 112. Employer's request indicates that it sought further proceedings before the administrative law judge and not appellate review. *Id.* Accordingly, employer's effort to obtain a formal hearing in this case do not evince an intent to seek Board review of the district director's Compensation Orders.[6]

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[6] Moreover, we note that even if we were to construe employer's request for a formal hearing as a timely notice of appeal

Accordingly, the administrative law judge's Order of Dismissal and Order Denying Employer's Motion for Reconsideration, and the district director's Compensation Order Award of Attorney Fees, are affirmed. The district director's Compensation Order Award of Attorney Fees on Reconsideration is modified to reflect that claimant's counsel is awarded a fee of $309.50. In all other regards, the district director's Compensation Order Award of Attorney Fees on Reconsideration is affirmed.

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filed before the Board, employer's contentions are nevertheless without merit. An attorney can be compensated for time spent even before claimant appoints him in writing. *See Grimm v. Director, OWCP*, 4 BLR 1-203 (1981); see generally *Liggett v. Crescent City Marine Ways & Drydock Co.*, 31 BRBS 135 (1997) (en banc) (Smith and Dolder, JJ. dissenting). The actual date that claimant's counsel files his notice of representation with OWCP has no bearing on the integral issue involved in awarding an attorney's fee, i.e., whether the requested fee is reasonably commensurate with the necessary work done, taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132. Furthermore, inasmuch as the district director may only award an attorney's fee for work performed by counsel at that administrative level, she has already implicitly considered and rejected employer's contention that counsel is not entitled to any fee for work performed prior to the date that he filed his notice of representation. In addition, the district director explicitly concluded, in her Compensation Order Award of Attorney Fee on Reconsideration, that counsel "has explained his representation in the case." Compensation Order Award of Attorney Fee on Reconsideration dated December 24, 1996, at 1.

SO ORDERED:

/s/ BETTY JEAN HALL
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ ROY P. SMITH
ROY P. SMITH
Administrative Appeals Judge

/s/ NANCY S. DOLDER
NANCY S. DOLDER
Administrative Appeals Judge

APPENDIX D

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of:

ROBERT CABRAL, *Claimant*, v.	Date Issued: APR 02 1997
HEALY TIBBITTS BUILDERS, INC., *Self-Insured Employer*,	
and	Case No. 95-LHC-1763 OWCP No.: 15-39103
DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, *Party-In-Interest*	

ORDER

On January 29, 1997, this office issued an *Order of Dismissal* in the above-captioned matter dismissing a request for formal review of an award of attorney's fees by the District Director. The *Order* incorrectly identified the moving party as "Claimant's counsel" when, in fact, Employer, through its Corporate Risk Manager, made the request.

As the Order of Dismissal indicated, this Office does not have jurisdiction to consider the adequacy of an award of attorney's fees for services rendered before the District Director. *Mazzella v. United States Terminals*, 8 BRBS 755, *aff'd on recon.*, 9 BRBS 191 (1978); *Hawkins v. Golden Commissary*, 8 BRBS 664 (1978).

Accordingly,

IT IS ORDERED that the January 29, 1997 *Order of Dismissal* is amended to reflect that Employer, through its Corporate Risk Manager, submitted the request for reconsideration to this Office. The *Order of Dismissal* remains unchanged in all other respects.

IT IS FURTHER ORDERED that Employer's request for reconsideration is DENIED.

Entered on this date, April 2, 1997 by:

/s/ JAMES GUILL
JAMES GUILL
Associate Chief Administrative
Law Judge

APPENDIX E

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of:

ROBERT CABRAL
Claimant,

v.

Case No. 95-LHC-1763
OWCP No.: 15-39103

HEALY TIBBITTS BUILDERS, INC.,
Self-Insured Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

ORDER OF DISMISSAL

The above-captioned matter was referred to this Office upon request of Claimant's counsel for, as stated by the district director, "formal review of the attorney fees approved" by her. However, the Benefits Review Board (Board) has held that assessment of an attorney's fee by the district director is a discretionary act and review of such an award is, therefore, properly sought by filing a notice of appeal with the Board as the administrative law judge has no authority to review the adequacy of a fee award for services performed before the district director. *Mazzella v. United Terminals*, 8 B.R.B.S. 755, *aff'd. on*

recon. 9 B.R.B.S. 191 (1978); *Hawkins v. Golden Commissary*, 8 B.R.B.S. 664 (1978). Accordingly,

IT IS SO ORDERED, that this matter be dismissed for lack of subject matter jurisdiction.

Entered on this date January 29, 1997, by:

/s/ JAMES GUILL
James Guill
Associate Chief Judge

APPENDIX F

U.S. DEPARTMENT OF LABOR
OFFICE OF LONGSHORE & HARBOR
WORKERS COMPENSATION
401 E. Ocean Blvd., Suite 720
Long Beach, CA 90802

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act.	: COMPENSATION ORDER : AWARD OF ATTORNEY FEES ON RECONSIDERATION
ROBERT CABRAL *Claimant*	: File No. 15-39103
HEALY TIBBITTS BUILDERS, INC. *Employer*	:
SELF INSURED EMPLOYER *Insurance Carrier*	:

Such investigation in the above entitled matter having been made as is considered necessary and no hearing considered necessary, the District Director makes the following:

FINDINGS OF FACTS

That the defendants by letter dated December 13, 1996, requested reconsideration of the Compensation

Order on Attorney Fees. The defendants object to an alleged $23.00 error in the prior order.

That Attorney Freidheim, by letter dated December 18, 1996, has agreed to reduced his fees by $23.00, as requested by the defendants. Applicant attorney has explained his representation in the case. The undersigned finds the lowering of the fees is a reasonable solution to this issue.

AWARD

Therefore, the December 6, 1996 prior Order is vacated herein and a fee in the amount of $309.00 is awarded to the Law Office of Jay Lawrence Friedheim. Said fee shall be assessed against the employer pursuant to Section 28 of the Act, 33 USC 928.

Given under my hand at
Long Beach, California this
24th day of December 1996

/s/ JOYCE L. TERRY
JOYCE L. TERRY
District Director
18th Compensation District

HPH//

APPENDIX G

U.S. DEPARTMENT OF LABOR
OFFICE OF LONGSHORE & HARBOR
WORKERS COMPENSATION
401 E. Ocean Blvd., Suite 720
Long Beach, CA 90802

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act.	: COMPENSATION ORDER : AWARD OF ATTORNEY FEES
ROBERT CABRAL *Claimant*	: File No. 15-39103
HEALY TIBBITTS BUILDERS, INC. *Employer*	:
SELF INSURED EMPLOYER *Insurance Carrier*	:

Such investigation in the above entitled matter having been made as is considered necessary and no hearing considered necessary, the District Director makes the following:

FINDING OF FACTS

That counsel for the claimant, Jay L. Friedheim, Esq. submitted an itemized fee petition for services performed at the District Director level, however, he has

reduced his fees by 50%, since he was not successful in all issues in the litigation of this matter. Additionally, he has reduced his fees by an additional $30.00 due to a miscalculation at the time of the filing.

That the counsel for the employer/carrier has submitted an objection to the applicant counsel's attorney fee petition.

That based on a review of the objections to the attorney fee petition and in order to be consistent with the Administrative Law Judge's Supplemental Decision and Order Awarding Attorney's Fees, the attorney fee award should be amended and reduced for the following reason:

That the objection that claimant's attorney's hourly rate of $150.00 and $100.00 per hour for work performed by Ed Ducey (legal assistant) are excessive, is without merit. The prevailing rate has been reviewed and is considered consistent with the ALJ's Supplemental Decision and Order Awarding Attorney's Fees dated 10/9/96. The rate of $150.00 per hour for the attorney and $100.00 per hour for Mr. Ducey is considered appropriate.

3/27/96: Employer objects to the 2.80 hours claimed by ED, for file review; as insufficient description of activity. 1 hour will be allowed for this file review one day before conference.

3/28/95: There are three entries for this date.

Mr. Ducey claims 3.40 hours to attend conference and summarize results, Employer objects to 3.40 hour as excessive since the conference lasted less than two hours. Employer further contends that a summary is unnecessary. Considering that the conference lasted less than two hours, 1.80 hours is reasonable amount of time for the conference.

Attorney Friedheim claims .40 hours as a teleconference with client re: informal conference; Employer objects to .40 hours as excessive and contends that the time should be reduced to .20 hours. .20 hours is a reasonable amount of time considering that claimant attended the conference.

Attorney Friedheim claims .40 hours in order to Draft memo re: informal conference. Employer objects to the entire entry since counsel did not attend the conference and is a duplicate entry for ED of same date. It does appear that the requested .40 hours is duplicate entry for ED on same date; this time will be disallowed.

3/30/95: Employer objects to .70 hours claimed by ED for teleconference with client re: informal conference and prior medical treatment, as a duplicate entry of 3/28/95 for claimant's counsel. .30 hours is reasonable amount of time for discussing medical treatment issues with claimant.

4/3/95: Employer objects to .7 hours for reviewing the Memorandum of Informal Conference as excessive and asserts that the time should be reduced to .30 hours. .30 hours is a reasonable amount of time for reviewing the 1 1/4 page Memorandum of Informal Conference.

4/11/95: Employer objects to the 1.20 hours claimed in order to Draft an Affidavit in support of expedited hearing, as excessive time; Affidavit consists of only $1\frac{1}{2}$ pages. .50 hours will be allowed for this entry.

4/12/96: Employer objects to .50 hours claimed in order to Draft letter to OWCP case, teleconference with client re: case. Employer contends that this entry is unintelligible and excessive time for a one page letter to OWCP. .30 hours will be allowed for one page letter to OWCP, the teleconference with client re: case appears to be a duplicate entry on the same day.

That employer's suggested reductions in hours to the fee petition, due to duplicative, excessive, and non-specific work, are reasonable and well documented. Accordingly, 1.90 of the hours claimed by Mr. Friedheim and 3.1 hours claimed by Mr. Ducey will be disallowed.

Further, Since the claimant failed to prevail in the entitlement to wage loss benefits and succeeded only in establishing "entitlement to certain relative minor medical benefits," the fees can only be awarded for work attributable to the medical care issue. Therefore, and in accordance with the ALJ Supplemental Decision and Order and the work performed at the District Director's level, one-third of the time spent on this case was devoted to obtaining medical care for the claimant.

Accordingly, Atty Friedheim's allowable time of 4.10 hours and Mr. Ducey's allowable 3.80 hours will be reduced by two-thirds. Thus the employer is liable for a total of 1.37 hours of work by Atty Friedheim and 1.27 hours of work by Mr. Ducey.

AWARD

A fee of $205.50 for Atty Friedheim and $127.00 for work performed by Mr. Ducey for a total of $332.50 is hereby approved in favor of the Law Office of Jay L. Friedheim, for necessary services rendered on behalf of the claimant. Said fee shall be assessed against the employer pursuant to Section 28 of the Act, 33 USC 928.

Given under my hand at
Long Beach, California this
6th day of December 1996

/s/ JOYCE L. TERRY
JOYCE L. TERRY
District Director
18th Compensation District

HPH//

APPENDIX H

PROCEDURE IN RESPECT OF CLAIMS

. . .

Sec. 19 (c) . . . . The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) the deputy commissioner shall, by order reject the claim or make an award in respect of the claim.

(d) Notwithstanding any other provisions of this act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

APPENDIX I

REVIEW OF COMPENSATION ORDER

. . .

Sec. 21(b)(1) . . . . There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this Act, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

Supreme Court, U.S.
FILED
JUL 25 2000
CLERK

(2)

No. 99-2072

IN THE

Supreme Court of the United States

HEALY TIBBITTS BUILDERS, INC.,

Petitioner,

v.

ROBERT CABRAL and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Whether review should be granted to determine whether or not the employer's failure to timely file a notice of appeal of the District Director's orders awarding a fee to the Claimant's attorney, payable by the Employer, under 28 (b) of the Longshore Act, for services in the proceedings before the District Director's office foreclosed appellate review of any issues raised.

2. Whether or not the Ninth Circuit Court of Appeals has correctly interpreted §921 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq. (the Act), as permitting the Benefits Review Board (Board) to conduct appellate review of a decision by the District Director without a hearing before an Administrative Law Judge even though the dispute presented no relevant factual issue.

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OPINIONS BELOW

The court of appeals Order denying Petitioner's petition for panel rehearing is reprinted as Appendix A of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc. It has not been officially reported.

The opinion of the court of appeals, reprinted as Appendix B of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., is officially reported at 201 F.3d 1090 (9th Cir. 2000).

The opinion of the Benefits Review Board, reprinted as Appendix C of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

The Order of the United States Department of Labor, Office of Administrative Law Judges, reprinted as Appendix D of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

The Order of the United States Department of Labor, Office of Administrative Law Judges, reprinted as Appendix E of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

The Compensation Order/Award of Attorney Fees on Reconsideration, reprinted as Appendix F of the Petition for

writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

The Compensation Order/Award of Attorney Fees, reprinted as Appendix G of the Petition for writ of certiorari filed by Healy Tibbitts Builders, Inc., has not been officially reported.

GROUNDS FOR JURISDICTION

The petitioner, Healy Tibbitts Builders, Inc. ("Healy Tibbitts") lacked jurisdiction to appeal the District Director's compensation Order to the Benefits Review Board pursuant to 33 U.S.C. §921(a); 20 C.F.R. §§802.205, 702.350 for failure to file a timely notice of appeal. The Benefits Review Board lacked jurisdiction, and so found, but Healy Tibbitts appealed the decision of the Board within 60 days after issuance of the Order. The Ninth Circuit Court of Appeals considered the matter and in its judgment dated February 2, 2000, found that Healy Tibbitts did not timely file a notice of appeal with the Benefits Review Board within the required 30 day time period after the District Director's ruling became final and affirmed the Benefits Review Board's dismissal of the appeal. On March 28, 2000, Healy Tibbitts' petition for rehearing was denied by the Ninth Circuit Court of Appeals.

This Court lacks jurisdiction under 28 U.S.C. §1254(1) because of Healy Tibbitts' failure to have appealed the original Order within the time allotted.

STATUTORY PROVISIONS INVOLVED

Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §921(a):

> A compensation Order shall become effective when filed in the office of the Deputy Commissioner as provided in §19 and, unless proceedings for the suspension or setting aside of such Order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

STATEMENT OF THE CASE

On April 5, 1995, an Administrative Law Judge ("ALJ") awarded Robert Cabral ("Cabral") limited medical benefits under Section 907 of the Longshore Harbor Workers' Compensation Act ("LHWCA") for an injury sustained while employed at Healy Tibbitts. The ALJ directed Cabral's attorney to file a fee application for his reasonably necessary work performed on behalf of the claim. Respondent, Cabral's attorney, Jay Lawrence Friedheim, submitted an application requesting $795.00 in fees for work performed before the District Director from March 20 through April 18, 1995, the date on which Cabral's claims were transferred to the Office of the Administrative Law Judge ("OALJ"). On December 6, 1996, the District Director awarded $322.50 in attorney's fees for the work performed before her office. Healy Tibbitts filed a motion for reconsideration, which included a "formal request for a hearing on the matter [before an ALJ] pursuant to 20 C.F.R. §702.316." Healy Tibbittts' motion was denied and the District Director reduced the award of attorney's fees to $309.50, as a result of a mathematical error in the initial Order.

On January 2, 1997, Healy Tibbitts requested a hearing before an ALJ on the $309.50 attorney's fee award order. The District Director transferred the matter to the OALJ. The Associate Chief ALJ, *sua sponte* dismissed the proceeding on the ground that the OALJ lacked subject matter jurisdiction and entered an Order on January 29, 1997. Healy Tibbitts submitted a request for reconsideration and

the Associate Chief ALJ issued an amended Order of dismissal on April 2, 1997.

On June 12, 1997, Healy Tibbitts filed a "petition for review and supporting brief." On March 24, 1998, the Benefits Review Board ("BRB") affirmed the District Director's compensation Order awarding attorney's fees, finding that the Healy Tibbitts did not file an appeal to the Board within thirty days of the date that the District Director's Order on reconsideration was filed on December 24, 1996. Citing, 33 U.S.C. §921(a); 20 C.F.R. §§801.205, 702.350; Porter v. Kwajalein Services, Inc., 31 BRBS 112 (1997); Ins. Co. of North America v. Gee, 702 F.2d 411, 15 BRBS 107 (CRT) (2nd Cir. 1983).

On February 2, 2000, the Ninth Circuit Court of Appeals filed their opinion finding that the BRB properly dismissed Healy Tibbitts' appeal of District Director's Order because Healy Tibbitts did not file an appeal to the Board until almost 120 days after the District Director's Order became final. On March 28, 2000, the Ninth Circuit Court of Appeals issued an Order denying Healy Tibbitts' petition for a rehearing *en banc* . On June 23, 2000, Healy Tibbitts filed a petition filed a petition for writ of certiorari.

Decisions of the BRB are reviewed for errors of law and adherence to the substantial evidence standard. Duhagon v. Metropolitan Stevedore Co., 169 F.3d 615 (9th Cir. 1999).

ARGUMENT

A. Reasons for Denying the Petition

I. Petitioner's Argument Never Addresses Their Failure to File a Timely Notice of Appeal

The decision of the BRB found that Healy Tibbitts did not file an appeal with the BRB within the required thirty days after the District Director's ruling became final. 33 U.S.C. §921(a); 20 C.F.R. §§802.205. The BRB found that Healy Tibbitts' request for a hearing before an ALJ did not constitute an appeal to the BRB.

The BRB found that the the Board lacked jurisdiction to review the merits of the District Director's compensation Orders awarding an attorney's fees as employer [Healy Tibbitts] did not file an appeal to the Board within thirty days of the date that the District Director's Order on reconsideration was filed on December 24, 1996, citing, 33 U.S.C. §921(a); 20 C.F.R. §§801.205, 702.350; Porter v. Kwajalein Services, Inc., 31 BRBS 112 (1997); Ins. Co. of North America v. Gee, 702 F.2d 411, 15 BRBS 107 (CRT) (2nd Cir. 1983).

In Porter, 31 BRBS at 114, the Board found that the Board lacked jurisdiction to review the merits of the ALJ's Decision and Order approving the settlement of a claim because the claimant did not file an appeal to the Board within

thirty days of the date that the Decision was filed. Citing, 33 U.S.C. §921(a); 20 C.F.R. §207.350. The case went on to consider that the Boards' regulations provide that a notice of appeal filed with another governmental agency shall be considered filed with the Board as of the date that it was received by that governmental agency where it is in the interest of justice to do so, citing, 20 C.F.R. §802.207(a)(2). The Board found that the claimant's motion in Porter, *supra*, was not a notice of appeal to the Board. In Porter, *supra*, it was found that the motion was directed to the ALJ, who ruled on it and the Board found that this did not evince an intent to seek Board review of the approved settlement. The BRB specifically found in Porter, *supra*, that in addition to the motion to rescind the settlement, the claimant sought a new formal hearing. The Board ruled that that indicated that the claimant sought further proceedings before the ALJ and not appellate review. The Board held that it was not in the interest of justice to consider the claimant's motion to rescind as a timely appeal of the ALJ's Order approving the settlement under §8(i). Porter, *supra*, was about compensation due to a claimant, i.e. it was a "claim."

Similarly, in our case, Healy Tibbitts in its efforts to insist upon its absolute right to a hearing before an ALJ, on the $309.50 attorney's fees awarded by the District Director, ignored its obligations under the law to file a timely notice of appeal to the BRB, and instead filed an LS-18 seeking a hearing on the merits of the award of the $309.50 attorney's fees claiming factual disputes previously not raised before the District director as the basis of the need for the hearing.

Petitioner Healy Tibbitts in this petition for writ of certiorari has not addressed in any way their own failure to file a timely appeal; therefore, it is not really possible to refute their arguments explaining this fatal oversight. Healy Tibbitts did not address this issue in their appeal of the BRB's decision to the Ninth Circuit Court of Appeals. Because they failed to raise any arguments they might have had below, perhaps they have accordingly waived their right and this Court should decline to consider their petition for certiorari. See, Grupo Mexicano v. Alliance Bond, 527 U.S. ____, 119 S.Ct. ____, 144 L.Ed. 2d 319, 330 n.3 (1999); Matsushita Electric Indus. v. Epstein, 516 U.S. 367, 379 n.5, 116 S.Ct. 873, 134 L.Ed. 2d 6 (1996); Holly Farms Corp. v. NLRB, 517 U.S. 392, 400 n.7, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996).

II. Review Is Not Necessary to Determine Whether the Ninth Circuit's Decision Conflicts With The Plain Statutory Language

The LHWCA was set up to handle the "claims" of injured workers and provides for an adjudicative function to determine the merits of the injured worker's claims for compensation from their employers. Incidental to the primary function of the Act of assisting injured workers to a timely recovery of health care and other benefits, there are certain administrative aspects which allow for the award of attorney's fees for a claimant's attorney who successfully or par

tially successfully pursues a claim for benefits for the injured worker. The Act in part achieves its purpose by encouraging attorneys to pursue meritorious claims by holding out the prospect of getting paid in a timely fashion for the work performed in representing the injured worker in their claim for workers' compensation benefits. As pointed out in the Ninth Circuit opinion in note 5, neither the Act nor its regulations define "claim" The regulations governing attorney's fees at least implicitly make a distinction between a "claim." and the attorney's fees themselves, citing, 20 C.F.R.§207.132(a) ("any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefore . . ."). When congress changed the adjudication of Longshore claims in 1972, it assigned factual disputes to formal hearings conducted by ALJs. However, District Directors retained limited jurisdiction to act in two specific areas; medical management and attorneys fees. There is no specific provision which exists to refer District Directors decisions to ALJs when one party disputes a decision on an issue such as an attorney's fee award by a District Director. The Ninth Circuit's decision has now joined the majority in holding that in such a case, when there are no factual issues in dispute, the party challenging a fee award does not have a right to a hearing before an ALJ, but must appeal directly to the BRB.

Only the Seventh Circuit in Pearce v. Director, OWCP, 647 F.2d 716 (7th Cir1981) has held that under the Act any party, including an employer, is absolutely entitled to a hearing on a claim as a matter of right. . The Fifth

Circuit and the BRB have rejected such a broad reading and the Ninth Circuit has now joined their interpretation. Oceanic Butler, Inc. v. Nordahl, 842 F.2d 773 (5th Cir. 1988) and Tupper v. Teledyne Movable Offshore, 13 BRBS 615 (1981)

The 1972 amendments to the Act transferred the hearings function to ALJs on disputed factual issues regarding claims but it did not address matters on which hearings were not held prior to 1972. The amendments did not confer a new right of hearing where none previously existed. Since 1972, the Director, OWCP, and the Board, have consistently maintained that purely legal issues are not within the jurisdiction of ALJs, and particularly the disputes about the adequacy of fee awards for work performed before the OWCP are solely within the District Director's discretion. Ellis v. Blake Constr. Co., 8 BRBS 650 (1978); Mazella v. United Terminals, Inc., 8 BRBS 755 (1978); Lawson v. Atlantic & Golf Stevedores, 9 BRBS 855 (1979); Lonergan v. Iras Bushey & Sons, Inc., 11 BRBS 345 (1979); Champagne v. Main Iron Works, Inc., 20 BRBS 84 (1987). The Fifth Circuit has twice affirmed this view, Oceanic Butler, *supra*; Lauzon v. Strachan Shipping Co., 602 F.Supp. 61, 664 (S.D. Tex.), *aff'd.*, 782 F.2d 1217, 1222 (5th Cir. 1985).

As the Ninth Circuit observed in our opinion, the Seventh Circuit's opinion in Pearce, *supra*, did not appear to consider the overall statutory structure which requires considering §19(c) and §19(d). Pearce, *supra*, considered a claim for benefits by a worker on an issue very different from that presented by this Cabral OWCP attorney's fee order appeal. In Pearce, *supra*, a recipient of benefits under a LHWCA claim sought review of a final order of the BRB

affirming the Deputy Commissioner's refusal to commute his bi-weekly benefits into a lump-sum compensation award. This activity by the Deputy Director was outside of the limited authority to act in the two specific areas of medical management and attorney's fees reserved to the District Directors after the 1972 amendments.

In Pearce, *supra*, the Court found that "it was the plain duty of the Commissioner to transfer the case to the Chief Administrative Law Judge for a hearing in which findings of fact and conclusions of law could be made and a compensation order entered by the Administrative Law Judge." Pearce, 647 F.2d at 724. The Pearce, *supra*, case was a matter that considered the adjudication of an injured worker's claim for compensation and not a collateral administrative issue, such as the approval of attorney's fees for work done before the OWCP prior to the time that a claim is transferred to the OALJ for a hearing of the claim on its merits. As stated in Pearce, *supra*, at 726, the Statutes of regulations make no distinction between administrative and adjudicatory actions in regards to an application of an injured worker's claim for compensation. "They apply equally to all claims and applications for workers' compensation benefits which are disputed or controverted." The administrative function in Pearce, *supra*, still related to the claim, the consolidation of the future compensation benefits due to the Claimant into a lump sum award payable to the claimant.

Similarly, Oceanic Butler, Inc., *supra*, involved a decision upholding a compromise and release settlement of

lifetime disability claims entered into by a worker who then died a week after the settlement was reached. It further included a dispute about whether or not the employer and insurer were entitled to offset the settlement against liability to the widow for death benefits. Again, this is a claim for benefits by an injured worker under the Act, and not a mere administrative proceeding such as a fee petition for a claimant's attorney who had successfully obtained benefits for an injured worker for work performed in representation of the injured worker's claim before the OWCP.

Lauzon v. Strachan Shipping Co., 602 F.Supp. 661 (S.D.Tex. 1985) was an action where a longshoreman sought to enforce a supplemental order by a Deputy Commissioner finding the employer was in default of an obligation to pay a compensation award to a claimant. It was found there that the Deputy Commissioner did not err in denying an employer's request for an official hearing before an impartial ALJ regarding whether or not the payment was tardy. It was undisputed that the longshoreman claimant did not timely receive payment of compensation for his claim from the employer. There it was found that an informal hearing was unnecessary because the application of the twenty percent penalty for overdue payments of compensation to the claimant of §914(f) was mandatory unless the employer had appealed the compensation order, and had obtained a Board or court order staying payments. A hearing is necessary only when there exists a genuine issue of disputed fact directly regarding the claim for compensation benefits.

When the matter was appealed to the Fifth Circuit Court of Appeals in Lauzon, *supra*, it was found that the Deputy Commissioner could issue an order "following an informal conference at which agreement is reached on all issues." 20 C.F.R §702.315(a). The material facts in that case were undisputed. Those facts were related to an employee's right to compensation under the Act, not to the approval of attorneys fees for work performed by this lawyer before the District Director at the local office of the OWCP.

CONCLUSION

For all of the foregoing reasons, the petition must be denied in all respects because of the employer's failure to file a timely notice of appeal. This case does not raise any significant issues nor will it have any impact on any decision. A denial of the petition for certiorari will reaffirm the right of the District Director to act in the very limited area of approving attorneys fees for work done in front of the District Director by attorneys or representatives of claimants who successfully pursue an injured worker's rights to compensation under the Act.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 25 2000

(3)

No. 99-2072

In the Supreme Court of the United States

HEALY TIBBITTS BUILDERS, INC., PETITIONER

v.

ROBERT CABRAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, a party challenging a district director's award of attorney's fees for work performed before the district director has a right to a formal hearing before an administrative law judge when no factual issues are in dispute.

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In the Supreme Court of the United States

No. 99-2072

HEALY TIBBITTS BUILDERS, INC., PETITIONER

v.

ROBERT CABRAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 201 F.3d 1090. The decision and order of the Department of Labor's Benefits Review Board (Pet. App. 18a-26a), orders of dismissal of the administrative law judge (Pet. App. 27a-30a), and orders of the District Director in the Department's Office of Workers' Compensation Programs (Pet. App. 31a-37a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 2, 2000. Pet. App. 3a. A petition for rehearing was

denied on March 28, 2000. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on June 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation for workers who suffer death or disability while employed on the navigable waters of the United States or on certain adjoining land areas. 33 U.S.C. 908, 909; see also *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 125 (1995). Claims for compensation are filed with a district director of the Department of Labor's Office of Workers' Compensation Programs. See 33 U.S.C. 913(a), 919(a).[1] The district director has "full power and authority to hear and determine all questions in respect of such claim[s]." 33 U.S.C. 919(a).

Prior to 1972, district directors conducted hearings on claims for compensation filed under the Act. In 1972, however, Congress directed that

> [n]otwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on [October

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[1] Although the LHWCA refers to "deputy commissioner[s]," the title of those officials was changed to "district director" by regulation. See 20 C.F.R. 701.301(a)(7), 702.105. Accordingly, we use the title "district director" throughout this brief to refer to both the present district directors and the former deputy commissioners.

> 27, 1972], in the [district directors] with respect to such hearings shall be vested in such hearing examiners.

See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1261 (33 U.S.C. 919(d)).

District directors, however, retained their authority to resolve claims informally when no hearing is needed and to issue appropriate compensation orders. See 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). If a hearing is necessary, the district director must transfer the case to an administrative law judge (ALJ), who issues a compensation order after conducting a hearing. 20 C.F.R. 702.348, 702.349.

Persons dissatisfied with a compensation order entered by a district director or an ALJ have 30 days to file an appeal to the Department of Labor's Benefits Review Board (Board). 33 U.S.C. 921(a) and (b); 20 C.F.R. 702.349, 702.350, 702.391. The Board is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]." 33 U.S.C. 921(b)(3). The Board's orders must "be based upon the hearing record," and findings of fact in the decision under review are "conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3). Board decisions, in turn, are reviewable in the courts of appeals. 33 U.S.C. 921(c).

In certain cases, the employer may have to pay a claimant's reasonable attorney's fee. 33 U.S.C. 928(a) and (b). Distinct from the administrative process governing compensation orders, Congress authorized each entity involved in the claims process independ-

ently to award attorney's fees for claims presented or work performed before it. Thus, the Board and courts have authority to award attorney's fees for work done before them, 33 U.S.C. 928(c), while district directors and ALJs, respectively, have authority to award attorney's fees for work performed before each of them, 33 U.S.C. 928(a), (c) and (d). See also 20 C.F.R. 702.132(a) (persons seeking attorney's fees "shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed"); 20 C.F.R. 702.134(a).

2. After formal proceedings before a district director and a formal hearing before an ALJ, respondent Robert Cabral obtained an award of medical benefits under the LHWCA. Pet. App. 4a, 20a n.1. The ALJ also awarded Cabral attorney's fees for work performed before the ALJ. *Id.* at 20a n.1. The district director subsequently issued a compensation order requiring petitioner to pay Cabral $332.50 in attorney's fees for work performed before the district director in the case. *Id.* at 4a, 33a-37a. Petitioner filed a motion for reconsideration, arguing that fees could not be awarded for work performed prior to the time that Cabral's attorney became the attorney of record. *Id.* at 4a. Petitioner's motion also requested a formal hearing before an ALJ if reconsideration was denied. *Id.* at 4a-5a. The district director denied reconsideration, making only a minor mathematical adjustment that reduced the award to $309. *Id.* at 31a-32a.

Petitioner did not appeal the district director's order to the Board, but instead repeated its request for an ALJ hearing. Pet. App. 5a, 20a, 24a. The district director transferred the matter to the Office of Administrative Law Judges. *Id.* at 5a. The ALJ dismissed the

matter for lack of subject-matter jurisdiction. *Id.* at 29a-30a. The ALJ reasoned that, because petitioner challenged only the amount of the fee awarded for services performed, the district director's award of attorney's fees was a purely discretionary act reviewable by the Board, and thus not subject to independent review and factfinding by an ALJ. *Id.* at 29a.

3. The Board affirmed. Pet. App. 18a-26a.[2] The Board explained that fee disputes must be referred to an ALJ only when they involve disputed questions of fact, and not when they involve purely discretionary acts of the district director or strictly legal issues. *Id.* at 22a. Because the present case challenged the district director's discretionary act establishing the number of compensable hours and raised a legal question concerning petitioner's liability under the Act, the Board affirmed the dismissal of petitioner's request for an ALJ hearing. *Id.* at 23a-24a.

The Board also concluded that it lacked jurisdiction to review the merits of the district director's attorney's fee award because petitioner did not appeal to the Board within 30 days after the district director's denial of reconsideration. Pet. App. 24a.

4. The court of appeals affirmed. Pet. App. 3a-17a. The court held that the LHWCA does not "confer an absolute right to a hearing before an ALJ," regardless of whether additional fact-finding is required. *Id.* at 7a. Tracking the language of 33 U.S.C. 919(d), the court explained that the LHWCA requires ALJ hearings to be held only on those matters with respect to which district directors were required to hold hearings prior to 1972. Pet. App. 7a. Prior to 1972, "[p]urely legal dis-

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[2] The Board made a minor $.50 mathematical correction in the amount of the award. Pet. App. 20a n.2.

putes or those that did not require fact-finding obviously did not necessitate an evidentiary hearing conducted by the [district director]," and, accordingly, "such disputes are not within the jurisdiction of the [Office of Administrative Law Judges]." *Id.* at 9a.

The court noted, moreover, that the procedure for attorney's fees under the LHWCA "is markedly different from the one for establishing liability and compensation on the underlying claim," Pet. App. 13a, in that the Act expressly assigns authority directly to the district director to make fee awards for work performed before that office. Because attorney's fees awards are "based on qualitative, subjective facts that are uniquely within the knowledge of the body before which the attorney appeared," *ibid.*, adding an ALJ hearing to the process, the court concluded, would "merely produce[] additional delay," and be "inefficient" and "illogical." *Id.* at 12a.

ARGUMENT

1. Petitioner contends (Pet. 11-12) that this Court's review is warranted because the court of appeals' decision conflicts with a two-decade old Seventh Circuit decision. No square conflict exists, however. In *Pearce* v. *Director, OWCP*, 647 F.2d 716 (1981), the Seventh Circuit held that a claimant's disputed request to convert an award of periodic compensation payments into a lump-sum award was subject to a hearing and determination by an ALJ, and hence that the district director's order denying the request for a hearing was beyond his authority. *Id.* at 722. The court, however, held only that "the right to a hearing applies to all claims and applications for *workmen's compensation benefits*." *Ibid.* (emphasis added). No claim for attorney's fees was involved in *Pearce*, and the court

had no occasion to address the availability of ALJ hearings on attorney's fees matters in light of Congress's express provision that attorney's fees decisions be made separately by each body before which counsel appeared. As the court of appeals noted in the present case, the procedure for attorney's fees under the LHWCA "is markedly different from the one for establishing liability and compensation on the underlying claim." Pet. App. 13a. Thus, that part of the *Pearce* decision concerning the respective jurisdictions of district directors and ALJs over compensation claims —which no panel within the Seventh Circuit and no other court of appeals has ever cited favorably—sheds little light on how that circuit would resolve the narrow attorney's fee question presented in this case, in light of the distinct statutory structure for litigating such fees.[3]

The court of appeals (Pet. App. 14a) characterized its decision as "at odds" with *Pearce* only to the extent that the Seventh Circuit construed 33 U.S.C. 921(b)(3) as establishing that a hearing was a necessary predicate for Board review. See *Pearce*, 647 F.2d at 724. The *Pearce* court's construction of Section 921(b)(3) does not appear to have been critical to its decision, however. First, in *Pearce* and unlike in the present case, a factual dispute existed regarding the claimant's request for a lump-sum payment, which could have been sufficient in its own right to necessitate resolution through a

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[3] The *Pearce* decision is in tension with the Fifth Circuit's decision in *Oceanic Butler, Inc.* v. *Nordahl*, 842 F.2d 773 (1988), a case that also did not involve attorney's fees. Moreover, the enduring relevance of *Pearce* has been further undermined by Congress's repeal of the commutation provision at issue in that case. See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 13, 98 Stat. 1649 (repealing 33 U.S.C. 914(j) (1982)).

hearing. See 647 F.2d at 719 ("the dispute amounted to this: Pearce argued that, under commutation [of the periodic payments], he would get $134.74 per month more under [a separate disability insurance] policy whose benefits he had earned by paying premiums, and [the employer] argued that that difference would most likely soon be absorbed by increases in social security benefits").

Second, the Seventh Circuit also based its decision in part on what it viewed as the agency's noncompliance with its own regulations, which is not an issue in the present case. See 647 F.2d at 722 (discussing regulations on commutation of future benefits that required, among other things, that a district director obtain prior approval of the Director). Dictum that was issued in a distinctly different statutory context and that has never been followed by other panels or other circuits in nearly two decades does not create the type of inter-circuit conflict that warrants this Court's review.[4]

2. Petitioner also contends (Pet. 4-11) that the court of appeals' decision is inconsistent with the language and structure of the LHWCA. Petitioner's argument,

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[4] Petitioner argues (Pet. 10) that the Sixth Circuit "inferential[ly]" construes 33 U.S.C. 921(b)(3) not to permit appeals to the Board from district director decisions, citing *Pyro Mining Co.* v. *Slaton*, 879 F.2d 187, 190 (6th Cir. 1989). *Pyro*, however, held only that ALJs "have jurisdiction to rule on the adequacy of notice given to carriers and employers in black lung cases." *Id.* at 189. The court did not decide any issue concerning ALJ jurisdiction to review district director decisions on attorney's fee applications or disturb the rule that, in black lung cases, decisions of district directors "shall be appealable directly to the Benefits Review Board." 20 C.F.R. 725.366(e). Cf. 30 U.S.C. 932(a) (Black Lung Benefits Act incorporates certain sections of the LHWCA, including its review provisions, "except as otherwise provided in this subsection or by regulations of the Secretary").

however, fails to come to grips with the plain language of the LHWCA, 33 U.S.C. 928, that expressly assigns district directors the independent authority to pass upon the appropriateness of a fee award for work performed before them. Whatever their role in adjudicating compensation claims (see Pet. 5-11), ALJs have no appellate review authority over district directors and they have no authority, statutory or otherwise, to make the discretionary and "qualitative, subjective" judgments (Pet. App. 13a) about the appropriateness of fee awards for work performed before—and thus witnessed exclusively by—the district directors. Indeed, petitioner points to nothing in the LHWCA's plain language that defines when a "hearing" on attorney's fees must be held or that prescribes procedures that courts, the Board, ALJs, or district directors must follow in awarding attorney's fees under 33 U.S.C. 928.

In recognition of the distinct status of attorney's fee applications, moreover, the Director of the Office of Workers' Compensation Programs has promulgated separate regulations governing attorney's fees. 20 C.F.R. 702.132-702.134. Those regulations require attorneys seeking fees to "make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed." 20 C.F.R. 702.132(a). Consistent with the Act's separate treatment of compensation claims and attorney's fees, see Pet. App. 13a, the Director and Board have concluded that an ALJ hearing is not required when a district director's decision on attorney's fees involves either those discretionary judgments that Congress expressly assigned to the district directors or strictly legal issues, but that such a hearing is required when a fee dispute involves questions of fact. Pet. App. 22a; see also, *e.g.*, *Glenn* v.

Tampa Ship Repair & Dry Dock, 18 Ben. Rev. Bd. Serv. (MB) 205, 207 (1986); *Mazzella* v. *United Terminals, Inc.*, 8 Ben. Rev. Bd. Serv. (MB) 755, 758, aff'd on reconsid., 9 Ben. Rev. Bd. Serv. (MB) 191 (1978); see also *Oceanic Butler, Inc.* v. *Nordahl*, 842 F.2d 773, 784 (5th Cir. 1988) (referral to an ALJ not necessary when it "would merely have produced additional delay, without the possibility of a different outcome").

That interpretation of the Act is reasonable. See, *e.g.*, *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997) (Director's interpretation of the LHWCA receives at least some weight). The "hearing[s]" conducted by ALJs must comply with the formal hearing requirements of "section 554 of title 5," 33 U.S.C. 919(d), and under Title 5, formal hearings are not required when no material facts are in dispute. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973); *Wisconsin* v. *FERC*, 104 F.3d 462, 467-468 (D.C. Cir. 1997); cf. *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 228 (1991). Furthermore, absent a factual dispute, an ALJ hearing can perform no meaningful function. The ALJ's adjudicatory capacity has no relevant application to purely discretionary decisions made by the district director, and ALJs have no greater capacity than the district directors to decide questions of law (subject in either case to Board and court of appeals review).

Contrary to petitioner's argument (Pet. 4-7), moreover, the Board's review authority is not confined to cases in which an ALJ hearing has been held. Congress granted the Board authority "to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]."

33 U.S.C. 921(b)(3). That authority is not limited to decisions by ALJs after a hearing, but instead reasonably includes decisions by a district director with respect to attorney's fees when there are no material factual disputes. The requirement that the Board's orders "be based upon the hearing record," 33 U.S.C. 921(b)(3), merely indicates that the Board cannot go beyond the hearing record, in cases where such a record exists, either by considering further evidence or by making its own findings of fact.[5]

Petitioner also errs in arguing (Pet. 7-11) that, in 1972, Congress assigned all "adjudicatory" functions to ALJs and left the Director with only administrative and rulemaking functions. Congress assigned the ALJs authority only with respect to matters necessitating "hearings." 33 U.S.C. 919(d); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1261. In fact, Congress simultaneously recognized the authority of district directors, as well as ALJs, the Board, and courts, to approve requests for attorney's fees. See S.

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[5] Petitioner also inaccurately argues (Pet. 5) that 20 C.F.R. 802.301(a) indicates that only evidence that is part of a record developed at an ALJ hearing can be considered by the Board. That regulation states that the Board "is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it," but is "authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based." 20 C.F.R. 802.301(a). The regulation does not say that the "decision or order appealed from" must be the decision of an ALJ after a hearing, and 20 C.F.R. 802.201(a)(1) specifically allows an appeal from "a decision or order of an administrative law judge *or deputy commissioner* to the Board" (emphasis added). See note 1, *supra* (substituting term "district director" for "deputy commissioner").

Rep. No. 1125, 92d Cong., 2d Sess. 8 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 9 (1972).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2000

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[6] Nor did this Court "confirm[]" the district directors' "total loss of adjudicatory authority" (Pet. 8) in *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 125 (1995). The Court held only that the Director lacked standing to seek court of appeals review of a Board order because the Director, in that case, was not a "person adversely affected or aggrieved" by the order under 33 U.S.C. 921(c). See *Newport News*, 514 U.S. at 125-136. The case had nothing to do with, and this Court did not address, the authority that district directors retained to determine attorney's fee awards.

(4)

No. 99-2072

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HEALY TIBBITTS BUILDERS, INC.,

Petitioner,

—v.—

ROBERT CABRAL AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner has asked this Court to determine whether the structure of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (the Act), permits appellate review by the Benefits Review Board (Board) in the absence of a "hearing record". Pet. at 2-11. This fundamental question of procedure arises because the Board has adopted a practice unsupported by statutory language where "decisions" issued by local district directors in contested claims are subjected to direct appellate review although no "hearing record" does or can exist. The adoption of this practice, often referred to as "direct appeals", has been criticized and terminated by the Seventh Circuit Court of Appeals in *Pearce v. Director, OWCP*, 647 F.2d 716 (7th Cir. 1981), but accepted by the Ninth Circuit Court of Appeals in the decision under review herein.

The Federal Respondent contends that this fundamental question of procedure either does not exist or need not be resolved by this Court. Notwithstanding this contention, however, the Federal Respondent's opposition highlights, both in what it includes and in what it glaringly omits, the reasons the petition for a writ of certiorari should be granted.

I. Statutory Language

In support of the petition for a writ of certiorari, Petitioner has directed this Court to the plain and unambiguous language utilized by Congress to frame the appellate review authority held by the Board:

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from *decisions* with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the *hearing record*. The findings of fact

> in the *decision* under review by the Board shall be conclusive if supported by substantial evidence in the *record* considered as a whole.

33 U.S.C. § 921(b)(3) (emphasis added).

Petitioner interprets the foregoing language as permitting Board review only when, inter alia, a "hearing record" exists, i.e., a "record developed at [a] hearing before [an] administrative law judge." 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.301(a) and (b). Petitioner's interpretation assumes that § 921(b)(3) means what it says because said provision is unmodified by subsequent or prior relevant statutory language.

Notwithstanding the obvious importance of § 921(b)(3) and its limiting language, the Federal Respondent never once addresses said language in a direct fashion within the scope of its opposition. Rather than confront the part of § 921(b)(3) which limits Board review to the "hearing record" or explain, if possible, why Congress did not mean what it said, the Federal Respondent embarks upon a circuitous analysis of a completely different statutory section (33 U.S.C. § 928) in its effort to rationalize the irrational. Response at 8-10. This failure to specifically address the language of § 921(b)(3) which requires the existence of a 'hearing record" before Board review is tantamount to an admission that the practice of "direct appeals" has no tangible statutory support.

II. Circuit Court Conflict

In an effort to minimize and/or eliminate the decisional conflict which exists between the Seventh Circuit Court of Appeals' decision in *Pearce, supra*, and the Ninth Circuit Court of Appeals' decision under review herein, the Federal Respondent argues that no conflict exists because (1) the *Pearce* decision is too old; (2) a

"square" conflict does not exist because the underlying facts in *Pearce* were different than those herein; and (3) the precedential value of the *Pearce* decision is minimized to the point of insignificance because it has never been cited by a subsequent Seventh Circuit panel. Response at 6-8. Each position is untenable.

A. Age

Petitioner is aware of no theory of law or of precedent interpretation which renders decisions of a particular age void by the mere passage of time. Likewise, Petitioner is aware of no theory of law or precedent interpretation which renders ineffectual a decisional conflict between circuit courts of appeal if one of the decisions is twenty (20) years old. Were this a valid position, 20 year old decisions would be useless after the mere passage of too much time—a result which is clearly inappropriate and unsound. Moreover, the simple passage of time has never been viewed by this Court as bestowing a heightened or decreased sense of importance; reference to this Court's rejection of the "true doubt rule" in cases arising under the Act after said rule had been applied for decades illustrates the concept that time alone is an insufficient basis to accept or reject a particular practice. *See Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994). Accordingly, the Federal Respondent's attempt to minimize the impact of *Pearce* by emphasizing its age is confounding.

B. Square Conflict

The Federal Respondent attempts to reduce, minimize, or perhaps eliminate the existence of a conflict between *Pearce*, *supra*, and the decision under review herein by arguing that no "square" conflict exists because the factual underpinnings of both cases are different. Response at 6. Petitioner concedes (and has never argued other-

wise) that the facts of both cases are not the same, however, respectfully notes that the pertinent legal issue under review in both—whether Board review can be performed in the absence of a "hearing record"—was the same. In short, the *Pearce* court held that a "hearing record" is a necessary predicate to Board review:

> [T]he Board should have refused to hear the appeal and should have remanded it to the Chief Administrative Law Judge for further appropriate action as allowed by 33 U.S.C. Section 921(b)(4) quoted above, because the Board only had authority to review a "hearing record" and there was no such record before it. In short, there was nothing for the Board to review, as it had no authority to consider or review the evidence that had been gathered by the deputy commissioner, or his order, nor to substitute its views for those required to have been, but were not, set forth in an opinion of an administrative law judge.

Pearce, supra at 724-25.

Conversely and as clearly set forth at Appendix B 14a, the Ninth Circuit Court of Appeals held otherwise and recognized that their decision is "at odds" with *Pearce*. The Ninth Circuit did not qualify the existence or quality of their conflict with the Seventh Circuit nor was such a qualification warranted given the divergent substance of the two decisions. The Federal Respondent's attempt to presume the existence of or insert qualifying language on behalf of the Ninth Circuit is misguided; the Ninth Circuit could have but did not temper their assessment of the decisional conflict therefore no such diminution is presently warranted.

C. Precedential Value

The Federal Respondent contends that *Pearce* is ineffective precedent to establish a conflict with the Ninth Circuit's opinion at issue herein because the Seventh Circuit has never "followed" *Pearce* on an internal basis. Response at 7. Stated differently, the Federal Respondent asks this Court to assume that *Pearce* is no longer good law in the Seventh Circuit because it has never been explicitly followed by said Circuit in subsequent cases.

This contention must be rejected as without merit because *Pearce* has never been reversed and/or modified by the Seventh Circuit. Moreover, the mere fact that it has not been followed in subsequent decisions is a grossly misleading statement if viewed in isolation, *i.e.*, if it is not first recognized that the specific issue in *Pearce* regarding "direct appeals" has not been addressed by the Seventh Circuit after *Pearce*. Because the Federal Respondent did not direct this Court to a subsequent Seventh Circuit decision that rejects *Pearce*, their assertion that *Pearce* lacks precedential value because never followed is hollow—*Pearce* represents the Seventh Circuit's opinion on the propriety of direct appeals.

III. Direct Appeals

In its effort to convince this Court that direct appeals from district director decisions to the Board are procedurally permissible under the Act, the Federal Respondent relies upon the language of 20 C.F.R. § 725.366(e) which authorizes direct appeals in claims arising under a different statute (the Black Lung Benefits Act (BLBA) 30 U.S.C. § 932(a)). Careful review of pertinent aspects of the BLBA as contrasted with the Act, however, serves to highlight critical differences in the two statutes which makes direct appeal appropriate in one and clearly inappropriate in the other.

The BLBA confers initial adjudicatory authority on district directors as set forth at 20 C.F.R. § 725.350 (a) and (b):

> Sec. 725.350 Who are the adjudication officers.
>
> (a) General. The persons authorized by the Secretary of Labor to accept evidence and decide claims on the basis of such evidence are called "adjudication officers." This section describes the status of black lung claims adjudication officers.
>
> (b) Deputy commissioner. The deputy commissioner is that official of the DCMWC or his designee who is authorized to perform functions with respect to the development, processing, and adjudication of claims in accordance with this part.

In recognition of this status and to facilitate the exercise of adjudicatory powers granted, BLBA district directors are given all necessary authority to properly perform their role:

> Sec. 725.351 Powers of adjudication officers.
>
> (a) Deputy commissioner. The deputy commissioner is authorized to: (1) Make determinations with respect to claims as is provided in this part; (2) conduct conferences and informal discovery proceedings as provided in this part; (3) compel the production of documents by the issuance of a subpoena, with the written approval of the Director; (4) prepare documents for the signature of parties; (5) issue appropriate orders as provided in this part; (6) do all other things necessary to enable him or her to discharge the duties of the office.

See also 20 C.F.R. § 725.404.

And, to properly complement their role and power as initial adjudicator, BLBA district directors are authorized to issue decisions. 20 C.F.R. § 725.418. Reduced to essentials, therefore, BLBA district directors are recognized as adjudicators and are empowered to "make determinations with respect to claims", conduct conferences and discovery, issue subpoenas, issue orders, and issue contempt of court certifications. 20 C.F.R. § 725.351. Most important, BLBA district directors are authorized to develop a record, which, if necessary, travels intact to the next adjudicatory level (administrative law judge or Board). 20 C.F.R. § 725.451.

In strict and absolute contrast, district directors under the Act (Longshore district directors) are not designated adjudication officers and were in fact stripped of all adjudicatory function by Congress in 1972; moreover, Longshore district directors possess none of the powers necessary to effectuate adjudication, possess no true decisional authority in the face of disagreement, and possess absolutely no record-building authority or power. *See* 33 U.S.C. § 919(d); H.R. Rep. No. 92-11441, 92d Cong., 2d Sess. (1972); *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122 (1995); Pet. at 7-11. In point of fact, the administrative file created in front of a Longshore district director cannot be transferred "under any circumstances" when proceedings beyond the district director level occur. 20 C.F.R. § 702.318. As such, to whatever extent the "administrative file" can be construed as the "record", it cannot be transferred out of the Longshore district director's office for consideration by an administrative law judge or the Board. Any formal proceeding conducted under the Act after Longshore district director action cannot be predicated on the administrative file; it therefore follows that no "hearing record" exists under the Act after Longshore district

director action both because the district director has no authority to build a record and because the transfer of administrative materials for administrative law judge or Board use is prohibited.

Petitioner respectfully contends that the Federal Respondent's attempt to use the BLBA as support for the proposition that direct appeals under the Act are procedurally permissible via either 20 C.F.R. § 725.366(e) or 20 C.F.R. § 802.201(a)(1) highlights precisely why they are not. Direct appeals are possible under the BLBA because a hearing record exists and because that record can be and is transferred to the Board upon appeal. Conversely, direct appeals are impossible under the Act because no hearing record exists after Longshore district director action and because whatever documents are contained in the administrative file cannot be transferred to the Board. The Board can faithfully fulfill its limited mission to review the "hearing record" when direct appeals occur under the BLBA; the Board cannot fulfill this limited mission when direct appeals occur under the Act.

Lastly, the Federal Respondent's attempt to avoid this obvious logical pitfall by unilaterally redefining the critical term "hearing record" and by arguing that the "decision" referred to in 33 U.S.C. § 921(b)(3) need not necessarily be that of an administrative law judge is equally unimpressive. Congress did not leave the term "hearing record" undefined and therefore open to speculation as to its intended meaning. Rather, pertinent regulations specifically define said term as the compilation of evidence "developed at the hearing before the administrative law judge . . . ." 20 C.F.R. § 802.301(b). If that regulation is insufficiently clear, 20 C.F.R. § 702.318 also serves to assist in this endeavor by indicating that "the formal record of proceedings shall consist of the hearing record made before the administrative

law judge." Equally as important, however, when the foregoing is juxtaposed with the fact that Longshore district directors cannot create a record and with the fact that Longshore district director work-product is non-transferable to "further proceedings" under the Act, it becomes abundantly clear that the regulatory definition of "hearing record" is consistent with the overall structure of the Act.

As for the Federal Respondent's argument that use of the word "decision" could refer to the decision of a district director, i.e., it need not exclusively refer to an administrative law judge decision, Petitioner asserts that such an argument crumbles under the weight of clearly-expressed legislative intent. Response at 11n.5. First, Longshore district directors have no adjudicatory authority and therefore no true decisional authority. Second, Longshore district directors cannot create a record therefore Board review could, at best, be conducted on a bald decision—a clearly inappropriate course of action given that the Board's function is to review the record in concert with the decision to see if the former supports the latter. Third, pertinent regulations prohibit the transfer of Longshore district director work-product to the Board. 20 C.F.R. § 702.318. And fourth, construing the word "decision" in the first sentence of 33 U.S.C. § 921(b)(3) as unmodified by or completely independent from the second and third sentences wherein the term "hearing record" is repeatedly used is illogical and has the net effect of distorting legislative intent as expressed in successive sentences. The absolute shift in adjudicatory authority from district director to administrative law judge in 1972 strongly if not dispositively suggests that Congress did not intend for the word "decision" as used in § 921(b)(3) and as modified in successive sentences to mean anything less than a decision from an administrative law judge. Such a construction of the term "deci-

sion" comports *in toto* with all other changes to the Act made in 1972 and avoids the seemingly untenable position adopted by the Federal Respondent.

IV. CONCLUSION

For these reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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